No. 14767

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

HAROLD KENNEDY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-5-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

CHARLES P. MORIARTY, and
F. N. CUSHMAN,
1012 U. S. Court House,
Seattle 4, Washington,

Attorneys for Appellant.

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Seattle 4, Washington,

Attorney for Appellee.

cally during the month of January, 1954, Richard E. Mayer was a member of the Military Forces of the United States and was, on January 23, 1954, an employee of the United States Government and at all times referred to on said day was acting within the scope of his employment as a member of the Military Forces of the United States, and that at all times hereinafter referred to, Sergeant Richard E. Mayer was, in fact, proceeding and en route, pursuant to orders of Brigadier General Colbern, (said order being Special Order Number 2 of Headquarters, Fort Lewis, Washington, dated 5 January, 1954, and signed by Tito G. Moscatelli, Colonel, GS, Chief of Staff, made official by Jessee W. Scott, Chief Warrant Officer, United States Army, Assistant Adjutant General), to the Presidio at Monterey, California.

IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Richard E. Mayer was operating his automobile on said highway in a southerly direction,

being en route, pursuant military orders, to Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Sergeant Richard E. Mayer was negligent, which negligence was the proximate cause of plaintiff's damage hereinafter described in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on plaintiff's side of said highway;

3. Driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of the roadway;

4. In operating his automobile at an excessive speed in view of the weather conditions then and there obtaining on said highway.

VI.

That as a direct and proximate result of the aforesaid described negligence on the part of Staff Sergeant Richard E. Mayer, said plaintiff has suffered the following damages:

1. An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a laceration of the right

knee and leg; traumatic phlebitis of the right leg; large residual scar of the forehead and leg which is permanent.

2. Damage to his automobile in the sum of $1,318.81, said figure being arrived at through its being the reasonable depreciated value of said automobile before and after the collision herein described.

3. Loss of suit of clothes—$80.35.

4. Loss of use of automobile, being expense incurred to rent an automobile—$244.97.

5. Medical and hospital expenses in the sum of $444.80.

6. General damages for pain, suffering and residual permanent injuries in the sum of $7,500.00.

Wherefore, plaintiff prays for judgment against the United States of America in the sum of Nine Thousand Five Hundred Eighty-eight and 93/100 ($9,588.93) Dollars, and that his attorneys be awarded twenty per cent. (20%) of any amount awarded by the Court herein as compensation for their services herein, and for his costs to be taxed herein.

GEORGE R. MOSLER, and
GEORGE J. TOULOUSE, JR.,

/s/ GEORGE R. MOSLER,

/s/ GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, through its attorneys and for answer to plaintiff's complaint alleges and denies as follows:

I.

Admits paragraphs I and II.

II.

In answer to paragraph III defendant states that Sergeant Richard E. Mayer was a member of the military forces of the United States during the time in question; that Sgt. Mayer was required by official orders, signed as described in the complaint, to report for duty at the Presidio, Monterey, California, by midnight the 28th of January and further denies each and every allegation contained in said paragraph of the complaint except as hereinabove admitted.

III.

In answer to paragraph IV defendant admits the same.

IV.

In answer to paragraph V defendant admits that plaintiff was proceeding north on Highway 99, operating his 1951 Packard automobile; further admits that Sgt. Mayer was proceeding southerly; that a collision occurred at a point on said highway south of Seattle; defendant, however, denies each and every allegation of said paragraph, including with-

out limitation all specifications of negligence therein set forth.

V.

In answer to paragraph VI defendant denies each and every allegation therein set forth.

Affirmative Defense

I.

By way of further answer and affirmative defense, defendant alleges that the damages to plaintiff, if any, were caused by the negligent operation of plaintiff's automobile and in no part caused by any negligence on the part of Sgt. Richard E. Mayer or of defendant.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff and by way of amended complaint against the defendant, alleges as follows:

I.

That the plaintiff, Harold Kennedy, was at all times referred to herein and is now a resident of

King County, Washington, and a resident of the Judicial District of the United States District Court, for the Western District of Washington, Northern Division.

II.

That the plaintiff invokes the jurisdiction of the above-entitled Court, pursuant to the provisions of 28 U.S.C.A. 1346(b) and 28 U.S.C.A Sec. 2671, et seq.

III.

That on the 23rd day of January, 1954, Staff Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the United States of America, and at all times referred to on said day was acting in line of duty and within the scope of his employment. That at the time of the accident herein referred to said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954, and reading as follows:

"SFC Richard E. Mayer RA 19 319 029 Hq & Hq Co 16th Sig Bn Corps rel asg trf WP Army Language Sch Presidio of Monterey, Calif., at the time rept to Comdt thereat NLT 2400 hrs 28 Jan., 54, for purpose of attending forty-six wks Chinese Mandarin Language Crse. Ten (10) ADALVAHP 2/pt of delay Seattle, Wash., prior to rept to sch. EM rept AG-C Post for Con US records check prior to departure fr this sta. TC may determine common carr and furn nec trans and meal tickets and/or FC will pay alws auth by JTR. Subj EM chargeable against the Army Language Sch quota allotted to

Asst Ch of Staff GI. Auth: 6th Ind Hq 6A AMAGP-2 201 12 Nov., '53. PCS TPA TDN 2142010 401-6-206-18 P 1410-02 03 07 S 99-999. EDCSA: 14 Jan., '54.

By Command of Brigadier General Coldern:
Official.

TITO G. MOSCATELLI,
Colonel, GS
Chief of Staff.

JESSE W. SCOTT,
CWO, USA,
Asst. Adj. Gen."

That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was, under the terms of said order, authorized to travel by his privately owned automobile, and under the terms of said order, was entitled to be paid mileage at the rate of six (6c) cents per mile for the official distance of 1,001 miles to the Presidio of Monterey, California; that the said Richard E. Mayer was in fact so paid by the defendant herein for the mileage in question —all as provided for in said Special Order Number 2 and under the Joint Travel Regulations issued by the Department of Defense of the United States of America; that at the time of the occurrence of the accident hereinafter described said Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile and that it was necessary for said Rich-

ard E. Mayer to be so traveling on said 23rd day of January, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours (at 12:00 o'clock at night) on the 28th day of January, 1954.

IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Washington, Richard E. Mayer was operating his automobile on said highway in a southerly direction, being en route, pursuant said Special Order Number 2 hereinbefore set forth, to the Presidio of Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Richard E. Mayer was negligent, which negligence was the

proximate cause of plaintiff's damage, hereinafter described, in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on the plaintiff's side of said highway;

3. In driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of said roadway;

4. In operating his automobile at an excessive rate of speed in view of the weather conditions then and there obtaining on said highway.

VI.

That as a direct and proximate result of the aforesaid described negligence on the part of said Richard E. Mayer, said plaintiff has suffered the following damages:

(1) An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a laceration of the right knee and leg; traumatic phlebitis of the right leg; large residual scar of the forehead and leg which is permanent.

(2) Damage to his automobile in the sum of $1,318.81, said figure being arrived at through its being

the reasonable depreciated value of said automobile before and after the collision herein described.

(3) Loss of earnings in the sum of $200.00.

(4) Medical and hospital expenses in the sum of $444.80.

(5) General damages for pain, suffering and residual permanent injuries in the sum of Seven Thousand Five Hundred and No/100 ($7,500.00) Dollars.

Wherefore, plaintiff prays for judgment against the defendant United States of America in the sum of Nine Thousand Four Hundred Sixty-Three Dollars and Sixty Cents and that his attorneys be awarded twenty per cent. (20%) of any amount awarded by the Court herein as compensation for their services herein, and for his costs to be taxed herein.

/s/ GEORGE J. TOULOUSE, JR.,

/s/ GEORGE R. MOSLER.

GEORGE R. MOSLER, and
GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The complaint in this case charges that one Richard E. Mayer, a soldier in the United States Army,

while driving his own automobile en route to a new duty station in San Francisco, negligently caused a collision on January 23, 1954, on U. S. Highway 99, south of Seattle, thereby causing damages to the plaintiff.

It is pleaded and admitted that Sergeant Mayer was traveling pursuant to paragraph 13 of Special Orders Number 2 issued by the proper authorities at his former duty station, Fort Lewis, Washington. A copy of an extract from said orders showing paragraph 13 in its entirety is attached to this memorandum as Exhibit A. An agreed translation of those orders follows:

EXHIBIT A

"Thirteen: Sgt. 1/c Richard E. Mayer, RA (Regular Army) 19319029 Headquarters and Headquarters Company, 16th Signal Battalion Corps released assigned and transferred will proceed to Army Language School, Presidio of Monterey, California, at the proper time report to the Commander thereat no later than 2400 hours, 28 Jan., 1954, for the purpose of attending 46 weeks Chinese-Mandarin language course. Ten (10) days delay leave at home point with point of delay at Seattle, Wash., prior to reporting to school. Enlisted man to report to Adjutant General—C (Section) Post Headquarters, for continental U. S. records check prior to departure from this Station. Transportation Corps may determine common carrier and furnish necessary transportation and meal tickets and/or Finance Corps will pay allowances authorized by the Joint Travel Regulation. Subject enlisted man chargeable

against the Army Language School quota allotted to the Assistant Chief of Staff G-1. Authorization: Sixth Indorsement Headquarters, 6th Army, Presidio-2, 201 (Subject's personnel file) 12 Nov., 1953. Permanent change of station, travel by private owned vehicle is authorized travel direct as necessary. (The numerals after TDN refer to the account number allotted for funds in this type of transfer which pertains only to the Finance Corps.) EDCSA means Effective Date of Change of Strength Accountability: Jan. 14, 1954."

Based on the above facts, plaintiff contends that the United States is thereby liable for his damages under Title 28. U.S.C. 1346 b, which reads in part:

"* * * The District Courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *"

Title 28, U.S.C., Sec. 2671, defines:

" 'Acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Defendant in this motion contends that plaintiff has not stated a cause of action inasmuch as the facts pleaded show that Sergeant Mayer was not within the scope of his employment at the time of

the accident in question for purposes of the Tort Claims Act.

It was thought that there had been some conflict in the earlier decisions over the applicable law governing the determination of scope of employment. The 4th Circuit clearly determined this question in U. S. vs. Sharpe, 189 F.(2d) 239, at p. 241, stating:

"We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an employee of the government—acting within the scope of his office or employment. We look to the local law for the purpose of determining whether the act with which he is charged gives rise to liability."

This phase of the Sharpe decision was cited with approval by the 9th Circuit in Williams v. U. S., 215 F.(2d), 800, at least insofar as it applied to a member of the armed forces. In the Williams case the court referred to the question of a soldier's status for Tort Act purposes as a status:

"* * * quite different from the status of either an employee serving a private employer or a civilian employee serving the U. S. * * *"

and at p. 807 stated:

"But in dealing with the problems of federal liability for tortious acts of members of the military and naval forces a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine. By carefully chosen language it delimited the area

of federal liability for tortious acts of members of this group by specifically providing that so far as concerns such acts, the phrase 'acting within the scope of his office or employment' shall mean 'acting in line of duty' * * *. Congress made abundantly plain that federal liability can arise only when the tort-feasor member of our military or naval forces was actually 'acting in line of duty.' * * * We must (as we do in this case) hold that 'acting in line of duty' means acting in line of military duty."

Therefore, we see that the test of scope of employment in this case is to be determined only by reference to federal decisions. In addition, however, we find under the Williams case, 9th Circuit, that even if the serviceman's action might be within the "scope," as found in a federal case involving a non-serviceman, that additional tests must be met under the statute because of the peculiarities of the relationship between a serviceman and the Government as termed "line of military duty." Other circuits have merely ruled that the phrase "line of duty" does not extend the rule of respondent superior and that the term "line of duty" was used because it more correctly described action representing the Government than "scope of employment." U. S. v. Eleazer, 177 F(2d) 914, 918; Campbell v. U. S., 177 F(2d) 200.

The facts in the instant case show that an army enlisted man was given orders transferring him permanently from his station at Fort Lewis, Pierce County, Washington, to the Presidio at San Francisco; that he was given leave in the Seattle area

to catch a military train was not actionable against the United States. In the Campbell case the Court held that "line of duty" had not expanded the traditional "scope of employment," for Tort Act purposes even though the term had been interpreted more loosely for many intra-service situations. The Court said at p. 503, "to give it (scope of employment) a new and entirely different meaning, the greatly expanded one attributed to "in line of duty" when members of the armed forces themselves are claimants, is nothing more than an attempt to put the cart before the horse * * *."

Attached hereto as Exhibit "B" is an opinion from the District Court for the District of Maryland in the case of Paly v. U.S., not reported, which is probably the latest of the cases analogous to the instant fact situation. This case confirms the "scope of employment" test and upon application of the Federal Decisions decides that the United States cannot be liable where a serviceman uses his own car unless the United States be able to control such vehicle, at p. 12.

For the foregoing reasons it is respectfully urged that defendant's action be dismissed.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Asst. United States Attorney.

EXHIBIT B

In the United States District Court,
for the District of Maryland

Civil Action No. 6587

HARRY PALY,

vs.

UNITED STATES OF AMERICA.

Filed November 5, 1954

OPINION AND ORDER

Chestnut, District Judge:

This suit against the Government to recover damages for personal injuries is based on the Federal Tort Claims Act (28 U.S.C.A., particularly sections 1346, 2671, 2674). The plaintiff Harry Paly, was seriously injured on a Maryland highway in a collision between his Studebaker passenger automobile and a Dodge passenger automobile driven by David Stefan. The latter was an enlisted member of the United States Naval Forces stationed at the Patuxent River Base in Maryland, and had been ordered to act as a military escort for the body of another enlisted man who had recently died at the Station. In order to attend the funeral in Baltimore, Stefan was driving from the Base toward Baltimore in his own privately owned automobile. The United States defends the suit on two separate grounds (1) that the accident and resulting injury to the plaintiff was not caused by the negligence of

Stefan and (2) in any event the defendant is not liable because Stefan at the time was using his own privately owned automobile without orders to do so. I will discuss these two questions separately.

The principal and controlling facts with respect to the circumstances of the accident can be briefly stated. The collision occurred about 12:10 a.m., on January 6, 1953, on Route 301, about 5 miles south of Upper Marlboro, the County Seat of Prince George's County, Maryland. The weather was clear and the road was dry and the particular place was entirely unlighted. The improved asphalt roadway at that point was 18 feet wide with a gravel shoulder of 3 feet on each side. The plaintiff, a traveling salesman, was driving along in his automobile from New York to his business territory in North Carolina. He had spent the prior day in Elkton, Maryland, about 100 miles away, to have repairs to or replacements of some bearings in his car and had been instructed by the mechanic not to drive the car for the next 50 or 100 miles in excess of 35-40 miles an hour. The maximum speed limit at the place was 50 miles an hour. The collision occurred just a few feet or yards north of a sharp curve to the right for a motorist driving north. The plaintiff was driving south and Stefan was driving north. Both were alone in their respective cars. There were no witnesses to the accident other than the respective drivers. The noise of the crashing cars was heard by some neighbors whose house was about 100 yards to the north. An ambulance was immediately telephoned for and arrived in a few minutes. A

County police officer was also summoned and arrived in about 15 minutes. Photographs were immediately taken showing the condition of the roadway and the position of the cars respectively which had not been moved before the arrival of the officer.

The plaintiff testified that he had been driving for several hours at approximately 35 miles an hour pursuant to the advice of the mechanic at Elkton; but that by virtue of head injuries sustained as a result of the collision he had retrograde amnesia and was unable to remember particularly any incidents immediately leading up to the collision. Stefan testified that as he was approaching the right hand curve which was shortly north of the crest of a slight rise or upgrade in the road, he saw first the lights of the southbound plaintiff's car which appeared to him to be coming directly toward him; that he dimmed his lights but, thinking that the plaintiff's car was on the wrong side of the road, and fearing that there was an embankment rising from the gravel road surface on his right, his best choice to avoid a collision was to swing his own car to the left across the white line indicating the center of the road, in an attempt to pass the plaintiff's car on the far side of the southbound lane. It is contended for the defendant that Stefan was confronted with an emergency and that he was justified in intentionally crossing into the wrong lane to avoid the collision. The Maryland statutes, however, explicitly provide that automobiles shall be driven on the right half of the roadway; and in intentionally swinging his car to the left

across the middle of the roadway Stefan was clearly violating the Maryland highway traffic statute. Maryland Code of 1951, Art. 66½, ss. 182, et seq.

There is no sufficient evidence in the case to show that the plaintiff's car was proceeding otherwise than in accordance with the Maryland statute other than Stefan's statement that he thought the plaintiff's car was on the wrong side of the road, and it is quite possible that this thought on his part was caused by the position of the plaintiff's car in approaching the crest of the slight hill and the curve of the road. Much more importantly, however, is the evidence of several disinterested witnesses as to the location of debris resulting from the collision consisting of dirt, glass particles, rust, etc., and a gouge in the road surface resulting from the collision. All these marks and indications as to the place of collision were definitely on the southbound roadway, that is the plaintiff's proper side of the road. Furthermore, the photographs of the position of the cars taken promptly after the accident showed that the plaintiff's car was far to the right on the southbound lane and the car driven by Stefan, while in the northbound lane, was near the center line.

Counsel for the defendant contends that considering the whole evidence in the case it is too slight and uncertain to make a finding that the collision was due solely to the negligence of Stefan. But after much thought about it I have concluded to the contrary. Two facts stand out clearly. One is that the collision did in fact occur in the plaintiff's southbound lane, and the other is that Stefan stated that

he did in fact intentionally cross over the white center line from his lane into that of the plaintiff. He stated his justification for thus violating the applicable Maryland statutory law was that he was faced with a sudden emergency and that he had to exercise instantaneously his best judgment to avoid a seemingly otherwise certain collision. After considering carefully his testimony on this point in the light of all the other facts of the case and considering the width and condition of the roadway and the circumstantial evidence of the place of collision and the position of the cars after the collision, I do not find that he was justified in the very unusual action that he took. It presented an issue of fact to be decided by a jury, or the trier of the facts. Consolidated Gas Elec. Lt. & Power Co. vs. O'Neill 175 Md. 47. It may be considered that he acted in good faith but it was evidently a very hurried and very unwise action. Indeed it was an extremely hazardous thing to do in view of the limited width of the roadway. An examination of the photographs taken at the time will show it was utterly improbable, if not absolutely impossible, for him to have succeeded in avoiding the plaintiff's car by crossing into the southbound lane. And it may also be noted from the evidence that Stefan first noted what he thought was the position of the plaintiff's car in the northbound lane when it was about 150 feet away; but it does not appear that he attempted to stop by vigorously applying his brakes or sounding his horn as a warning signal to the other car. Nor is there any satisfactory evidence other than Stefan's expressed belief as to

the position of the plaintiff's car to show that the latter was in fact traveling in whole or in part in the northbound lane. I think the whole evidence shows that if Stefan had complied with the statutory requirement to keep to his right of the road a collision would not have occurred as at the time of the collision the plaintiff's car was on his right side of the road.

The defendant's second ground of defense requires a careful consideration of the applicable law. Before answering the complaint the defendant filed a motion for judgment on the pleadings on the ground that the defendant was not liable as a matter of law for Stefan's negligence, if any. At the time, an affidavit was submitted which in substance was to the effect that he was traveling in his own automobile without express order to that effect, but to carry out the order to act as military escort for a deceased member of the Naval Forces. A copy of the order was also filed. In the argument on the motion counsel for the Government stressed the point that Stefan was using his own automobile to drive from Patuxent River Naval Base to Baltimore, a distance of more than a hundred miles, without any order as to his mode of travel and that he determined for himself to use his private automobile although to be reimbursed for his expenses in accordance with general authorized practice in such matters. In overruling the motion without prejudice I filed a short memorandum opinion to the effect that the point of law was not sufficiently clear merely on the papers filed in support of the motion to decide the question

at that time, and it was pointed out that probably a hearing of the case at a trial would result in developing the applicable Navy instructions or regulations, customs and practices in relation to the duties of Navy personnel assigned to act as military escort. The evidence in this case has now developed seemingly as fully as possible just what were at the time the applicable Naval instructions or practices upon the subject. They will be stated as briefly as possible.

Lt. Comdr. Martz, stationed at Washington, D. C., is the chief administrative official of the Bureau of Naval Personnel in charge of the naval escort program, the basic statute for which is 34 U.S.C.A., s. 923. He explained that the purpose of appointing a naval escort for a deceased member of the Naval Forces was not only as a courtesy or honor to the next of kin, but that the person so appointed as a naval escort should have the responsibility for the safe and prompt delivery of the body of the decedent to the next of kin; and that it was also the duty of the escort to attend the funeral if desired by the next of kin. In the ordinary course the program is carried out in the following way. When the death of a member of the Naval Forces occurs his next of kin is immediately notified and asked whether a naval escort is desired, and if so, what recommendations, if any, the next of kin desires to make. Upon receiving an affirmative request and recommendation by the next of kin, another member of the Naval Forces of equivalent rank to that of the decedent is

at once appointed as a naval escort, whose duty it is to accompany the body of the decedent by suitable transportation facilities, dependent upon the residence of the next of kin, and to attend the funeral.

Stefan's orders in the instant case referred specially to the Bureau of Personnel Manual, Art. C-9810, a copy of which has been filed in this case as defendant's Ex. 3-D. With more particular reference to the mode of travel to be used by the naval escort, Commander Martz referred to travel instructions (see Defendant's Ex. 3-A), which provided in substance that travel orders would be issued in each case and "when government transportation (including government air) is not available, issuing commands will make necessary arrangements as required in current transportation directives, wherein it will be noted travel orders will normally authorize travel by common carrier of passengers by railroad, bus, ship and air, etc."

It will be noted that this was in force in January, 1953, and did not make any reference to the use of privately owned automobiles by Naval personnel assigned to duty as naval escort. Commander Martz further pointed out, however, that as of June 23, 1953, general travel instructions for Navy personnel (including but not specifically for naval escort) were revised and Bureau of Personnel Instructions 1326.2 provided in section 6, printed page 4, that when deemed in the interest of the United States for the particular purpose to be served, written travel orders could specifically authorize Naval personnel to travel by private automobile; but such an order should

never be given merely for personal convenience of the individual (Defendant's Ex. 3-B); but there is no evidence to suggest that the general revision of travel instructions dated June 23, 1953, was in any wise due to or caused by the instant case.[1]

In the instant case the naval escort program at Patuxent River Base, comprising Naval personnel of about 7,000, was in charge of the Medical Department at the Base. Warrant Officer Mitchell of that Department was in charge, of the naval escort program. Edward J. Smutniak, stationed at Solomon's Island, Maryland, under the Patuxent River command, died on January 4, 1953. Warrant Officer Mitchell, acting through his aide, Chief Petty Officer Potts, at once advised the father of Smutniak, resident in Baltimore City, of the death of his son and inquired whether it was desired to have some one attend as a naval escort and if so, who was recommended. Smutniak's father promptly telephoned the Chaplain that a naval escort was desired and recommended the appointment of Stefan who was a cousin, also in the Service at the Base. The message was communicated to Warrant Officer Mitchell's office. Mitchell went off duty at 4:30 p.m., leaving

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[1]In this connection it may be noted that in the case of Jozwiak v. United States, 123 F. 2d 65 (D.C., Ohio) the facts stated show that the government official whose travel was there involved was specifically authorized by his written travel order in 1949 to use his own automobile but to be reimbursed only upon a showing that it was of advantage to the government to do so.

the matter in charge of Potts. Stefan had been on duty the night of January 4th but learning of the death of his cousin Smutniak, he had the next day, when on liberty, driven in his own automobile to be with his family thinking that possible information might be desired with respect to the circumstances of Smutniak's death, which was understood to have been a suicide caused by mental impairment. Stefan's liberty from the Service was for the day and he was not required to report to the Base until 8:45 p.m. In the meantime during the day the body of Smutniak had been removed by the locally engaged mortician to his funeral home in Leonardtown, Maryland, a few miles away from the Base, for preparation for burial. In ordinary routine Stefan as naval escort for the body would have proceeded from the Base to Leonardtown and from there would have traveled with the body in the mortician's vehicle to Baltimore; but for some reason not clearly explained in the evidence the mortician proceeded to transport Smutniak's body to Baltimore without waiting for the arrival of the naval escort. Stefan reported back for duty at the Base about 8:30 p.m., and at once met Warrant Officer Potts who had learned that the mortician had already left Leonardtown with Smutniak's body. Before Stefan reported Potts had previously telephoned instructions to the personnel office at the Base to issue travel orders to Stefan as the naval escort for Smutniak's body. Knowing that the mortician had previously left for Baltimore, Potts, when he saw Stefan, told him that

he, Stefan, had been appointed as the naval escort and that as the mortician was already on his way to Baltimore with Smutniak's body he, Stefan, should "get going" on his way to Baltimore. And that he should go to the personnel office for his written orders. Potts gave Stefan to take to Smutniak's next of kin some comparatively minor personal effects which had belonged to Smutniak, and the things customarily given to a naval escort. Potts knew that Stefan owned an automobile and may have known that Stefan had used it in going to and returning from Baltimore that day; but nothing was said by Potts or Stefan about what means of transportation should be used by Stefan. There was a bus line, however, which ran from the gate of the Naval Station to Baltimore which was available for and could be used by Naval personnel desiring to go to Baltimore. Just what the bus schedule was did not appear. There were also official cars at the Station which could be made available for necessary transportation. Nor was there any evidence that I recall as to the stated time for the funeral in Baltimore and it does not appear that Stefan was informed as to the time for the funeral although there was evidence that it did not in fact occur until January 8th.

The written order for Stefan's assignment is to be found in the record filed with the original motion of the defendant for a dismissal of the complaint. It is dated January 5, 1953, addressed to Stefan assigning him to temporary additional duty with a reference thereon to the Bureau of Personnel

Manual, Art. C-9810 heretofore referred to. In substance the material part of the order detailed Stefan as a naval escort for the late Edward J. Smutniak and continued "when directed by proper authority, you will proceed on or about 5 January, 1953, and accompany the remains from U. S. Naval Air Station, Patuxent River, Maryland, to Duda Funeral Home, Baltimore, Maryland. In carrying out these orders you will be responsible for the safe delivery of the remains at Baltimore and will attend the funeral and burial service unless contrary to the wishes of the next of kin. Upon completion of the funeral or burial services you will return to this Command. Authorized to travel at own expense subject to reimbursement. Expense of this temporary additional duty is chargeable to Appn. 173002.40, Medical Care, Navy 1953, Program Allot, 30000 O.C. 023 NAA 5023." The duration of Stefan's additional duty was for approximately 3 days and upon completion thereof Stefan was to return to the Base and resume his regular duties. The estimated cost of transportation, $90.00, per diem $21.00. The order also provided that the per diem in the execution of these orders is authorized in accordance with U. S. Naval Travel Instructions and Joint Travel Regulations for the Uniformed Services.

Stefan testified that upon leaving Officer Potts he went at once to the office of the Officer of the Day and received the written orders which he glanced at but did not critically or carefully read. It was the first time that he had received such an order but presumably he was not entirely unfamiliar

with such orders as he had been working in the Medical Department at the Base for some time past. Stefan made no inquiries about bus transportation to Baltimore as he decided to use his own automobile and about 10:30 in the evening he began his drive to Baltimore, the accident occurring a little after midnight when he had proceeded about 50 miles from the Naval Base. He himself was injured by the collision and was temporarily hospitalized but later returned to active duty.

On these facts the Government contends that there is no liability under the Tort Claims Act because at the time and place of the accident Stefan was not acting within the scope of his employment. Section 1346(b) of 28 U.S.C.A provides in part that the United States shall be liable "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government *while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Italics supplied.) And section 2671 "Definitions" provides in part "acting within the scope of his office or employment, in the case of a member of the Military or Naval Forces of the United States, means acting in 'line of duty.' " And section 2674 provides in part—"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under the circumstances, but

shall not be liable for interest prior to judgment or for punitive damages."

It is now well settled, at least in this Fourth Circuit, that in determining whether the agent or employee was acting in the line of duty and in the scope of his employment with relation to the United States, we must refer to federal law; but that in determining whether a private individual under like circumstances would incur liability we must refer to the law of the State where the alleged tort occurred. United States v. Eleazer, 177 F 2d. 914, cert. den. 339 U.S., 903; United States v. Sharpe, 189 F. 2d 239. In both these cases injuries to third persons occurred while military personnel were driving their own private automobiles for transportation from one official station to another and while temporarily on "leave status." In both cases the government was held not liable because the employees were under the circumstances not acting within the scope of their employment.

These provisions of the Act plainly state that the United States, in consenting to be sued for damages occasioned by the alleged negligence of its agents or employees, had limited its liability to those cases only in which the facts show that the agent or employee was acting within the scope of his employment at the time, and in the case of military personnel, if also acting in the line of duty, but then only if the liability of an individual employer under like conditions is established by the law of the State where the injury occurred. Otherwise stated, in the

instant case the plaintiff must show that Stefan was at the time of the injury acting (1) in the line of duty and (2) in the scope of his employment consistent with the Maryland law.

The phrase "scope of employment" is one of legal art which has long been directly associated with the general doctrine of "respondent superior." The phrase restricts the scope of the liability of the principal or master to cases where a servant is acting within the scope of his employment. And it is another generally accepted rule in this branch of the law that the employee was not acting within the scope of his employment unless at the time and place of the tort the principal or master has a right to control the servant's actions. This has been so fully and clearly explained in the decisions of the Fourth Circuit above cited that it is quite unnecessary here to elaborate the point. Particularly applicable here is a statement of the rule by the late Judge Walter H. Sanborn which is quoted in Judge Parker's opinion in the Eleazer case, 177 F. 2d, at page 916:

"The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim, 'respondent superior,' in the absence of the right and power in the former to command or direct the latter in the performance of

the act or omission charged, because in such a case there is no superior to respond."

Where the injury results from the use by the employee of a particular instrumentality, as in this case a private automobile, to render the master liable on the principle of respondent superior it must appear that the use of the instrumentality by the employee was under such conditions that he did not have a free hand in its use but was in that respect also subject to the master's control. This is pointed out particularly in A.L.I. Restatement of Agency at pages 539-549, cited with approval in Judge Parker's opinion on page 916. It is also clearly pointed out in the Eleazer case, supra, that the phrase "line of duty" in the Act as applicable to military and naval personnel does not expand the phrase "scope of employment" as generally understood in the legal doctrine of respondent superior.

In the instant case I think it is clear enough that in going to Baltimore to attend the funeral of Smutniak, Stefan was acting in the line of duty; but the question presented is whether at the time of the accident he was also acting within the scope of his employment under both the federal and the Maryland law. The facts of the particular case are certainly very unusual if not quite unique. None of the government officers in charge of the naval escort program had ever heard of a case in which the person assigned as naval escort had used a private automobile for that purpose. As already stated, except for the fact that the mortician had started

for Baltimore without waiting for the naval escort, Stefan would have ridden in the mortician's vehicle carrying the decedent's body. As Stefan did not receive his orders until after the mortician had left with the body it was, of course, impossible for him to perform that portion of the order which required him to proceed with the funeral cortege as escort. The remaining part of his duty covered by the order was to attend the funeral and incidental thereto to discharge that portion of the duties of the naval escort relating to contact with the next of kin at the burial service. The question in this case comes down to this—was Stefan acting in the scope of his employment in driving his privately owned automobile to Baltimore? There was clearly no express authority to do so either written or verbal. The written order stated that he was "authorized to travel at own expense subject to reimbursement." This is not an uncommon provision with respect to travel by federal employees. Its purpose is to provide that the employee will be reimbursed for the expense which he incurs in accordance with federal law at the rate applicable to the particular case. 5 USCA, s. 837.

I find nothing in the instructions for Naval personnel to warrant a conclusion that Stefan was impliedly directed to use his own automobile in this case. The form of instructions issued in June, 1953, did specifically provide that travel by privately owned automobile was not authorized unless the written orders so specified. While this latter in-

struction was not issued until some months after the accident in this case, Commander Martz, in charge of the whole Naval Escort Program, said that it had not changed the practice. No instance has been called to my attention in which Naval personnel were directed in their orders to use private automobiles for escort duty; and, as previously stated, Commander Martz had never heard of any case in which the naval escort had in fact used his own automobile.

Nor do I find any federal decision which would support the conclusion that Stefan was acting in the scope of his employment in the use of his private automobile in this case. The question as to the liability of the government for negligence in the operation of a privately owned automobile by a member of the Military or Naval Forces has arisen and been decided in several Federal decisions. Although I have found no case involving facts similar to the instant one the principle applied in nearly all of them is the same as in the opinion in the Eleazer and Sharpe cases, supra, in this Circuit. Some of the decisions in other Circuits are Rutherford v. United States, 73 F. Supp. 867 (D.C. Tenn.), affd. 168 F. 2d 70 (6th Cir.); Bach v. United States, 92 F. Supp. 715 (D.C.N.Y.); Jozwiak v. United States, 123 F. Supp. 65 (D.C. Ohio). The Sharpe and Eleazer cases in this Circuit also involve the use of privately owned automobiles by military personnel. To the same effect in principle see United States v. Campbell, 172 F. 2d 500 (5th Cir.)

cert. den. 337 U.S. 957, involving a pedestrian collision between Naval personnel and a third person. In all these cases the government was held not liable for the alleged torts of its employees. The only case that I have found in which the government was held liable for the negligent use of a privately owned automobile by its employees is Marquardt v. United States, 115 F. Supp. 160 (D.C. Calif.) not involving military personnel but relating to travel by an engineer to perform work on a rush military project.

There are a number of Maryland cases involving liability of an employer for the negligent operation by an employee of the latter's privately owned automobile; but I do not find in them any principle of law contrary to or inconsistent with the view of the scope of employment as expressed in the Eleazer and Sharpe cases in this Circuit. The principle that is applied throughout is whether on the particular facts the employee was authorized by the employer, either expressly or impliedly, to use his automobile in the performance of his duties. Where the employee does use his own automobile for his own convenience and without such authority from the employer it is held in effect that the latter is not liable because under the circumstances he does not have the right to direct and control the employee in the use of the automobile. In some of the cases it is said that in the latter situation the real status of the employee is that of an independent contractor rather than that of a mere servant or employee. In

general I think it can properly be said that the principle applied by the Maryland cases is not substantially different from the general law of agency with respect to the doctrine of respondent superior. The fullest discussion of the law applicable to the particular subject is to be found in Henkelmann v. Metropolitan Life Ins. Co., 180 Md. 591, and Great Atlantic & Pacific Tea Co. v. Koppenberger, 171 Md. 378. In the latter case, at page 392, reference is made to section 239 of A.L.I. Restatement of Agency which is discussed in Judge Parker's opinion in the Eleazer case. Other Maryland cases dealing with the use by employees of private automobiles are Goldsmith v. Chesebrough, 138 Md. 1; Regal Laundry Co. v. A. S. Abell Co., 163 Md. 525; Zink v. State, 132 Md. 670; Wood v. Gossard, 204 Md. 177. For a general discussion of the requirement as to scope of employment to hold an employer liable on the doctrine of respondent superior, not involving a private automobile, see East Coast Freight Lines, Inc., vs. Mayor & City Council of Baltimore, 190 Md. 256. In A.L.I. Restatement of Agency (1936) Maryland Annotations, we find in the discussion of section 239 of the Restatement headed "Use of unauthorized instrumentality"—

"The Maryland cases are in accord with the results stated herein in situations where an employee without authorization uses an instrumentality in his master's business and in cases where the servant is authorized to use his own instrumentality in his master's affairs. No cases seem to discuss the effect

of the use of an instrumentality in an employer's business with his authorization but without his assuming any control over its use."

Particularly in point here also is Alfred Khoury v. Edison Elec. Illuminating Co., 265 Mass. 256, 60 A.L.R. 1159, where the factual situation is in principle quite similar to the instant case although dealing with a civil and not a government employee.

It was said:

"In order that the relation of master and servant may exist, the employee must be subject to control by the employer, not only as to the result to be accomplished but also as to the means to be used."

This case was cited with approval in the Henkelmann and Neppenberger Maryland cases, supra. The same effect, and much in point here on principle and somewhat analogous facts is Conversion & Surveys, Inc., v. Roach, 204 F. 2d 499 (1st Cir.), 1953, opinion by Chief Judge Magruder.

In the instant case there was no evidence that Stefan had ever previously used his own automobile for government business; and there is therefore no suggestion that his use of it in the particular case was induced by prior knowledge, approval or acquiescence of his superior officers. He was directed to travel at his own expense subject to reimbursement at authorized rates but there was no direction to him either written or verbal to use his own automobile. His use of it was perhaps a natural and reasonable one on his own part under the circumstances but it was at his own election to do so and for his conveni-

ence at the time. Certainly the government had no right or power to control his manner of driving his own vehicle. If the accident had been caused not by his unfortunate error of judgment in driving, but by virtue of some mechanical defect in the operation of the steering mechanism it could hardly be thought that the government would be liable therefor as it had no interest in or ownership of the vehicle and no duty of inspection or repair, and so far as we know, no official knowledge even that Stefan owned an automobile, which apparently he used from time to time at his own convenience when off duty. Its use by him at the time was for his own convenience in going to Baltimore to comply with that part of his orders to attend the funeral services. He could have elected to travel by common carrier bus line or could have requested transportation in an official car from the Naval Station to Baltimore. While different in degree I think the situation is not different in principle from that of travel by a clerk of the court who is required to attend a session of court at a place distant from his official office, in which case, as stated in Judge Parker's opinion in the Eleazer case, the United States would not have been liable for the negligent operation of his automobile on the way. Similar situations in principle would seem to arise where other government officials such as Judges, United States Attorneys and others are required to attend for the performance of official duties at points distant from their official residence, in which case, as is generally known, they are at liberty if they personally prefer,

to use private automobiles and to be compensated therefor at the proper applicable rates under federal law. While the Eleazer and Sharpe cases in this Circuit differ on the factual situations particularly in the government, officials respectively were on leave of absence at the time, although generally pursuing a route to a long distant destination pursuant to orders, I feel constrained to hold that the principle that is applied in these cases is likewise applicable here and for that reason the complaint must be dismissed.

Having reached this conclusion, it is of course unnecessary to consider what would be the amount of compensatory damages to the plaintiff for the injuries that he sustained. But as the evidence has been very fully presented on both sides it is possible that a finding on that point might be useful and save time and expense of a new trial of the case in the event of disagreement by the Appellate Court with the conclusions here reached, if an appeal should be taken. I followed a somewhat similar course in the case of Jefferson v. United States, 77 F. Supp. 706; affd. 178 F. 2d 518; affd. 340 U.S. 135.

The plaintiff was severely injured by the collision. He had a fracture of the skull, a comminuted fracture of the kneecap, a broken arm, a dislocated hip, a broken cervical vertebrae and a partial paralysis of the sixth cranial nerve, causing double vision. He was hospitalized with many separate surgical operations over a period of more than a year. He was forced to wear casts on his body for many months. He sustained numerous bruises and lacera-

tions, some of which have left scars. But by virtue of very skillful surgery he has had a remarkably successful recovery and an avoidance of any permanent major disability. His hospital and doctors' expenses, or so-called out-of-pocket expenses, amounted to $5,213. His automobile, valued at about $1800, was totally destroyed. However, his counsel states that he was reimbursed for this loss except to the extent of $50 by an insurance company, which, however, has not joined in this suit, and is not represented by the plaintiff's attorney, who has expressed the preference that that item should not be included in the damages.

The plaintiff's age at the time of the accident was 25 years. He had had a high school and partial college education, but since leaving college his average annual net income from earnings had not exceeded about $1,000. For some months before the time of the accident he had been employed as a traveling salesman with a small salary and over-all commission for supervision of other salesmen. His net income for about 8 months of the year, however, as shown by his income tax returns did not amount to more than a few hundred dollars. He had prospects, however, of greater profits later. At the present time he is employed as a clerk in an insurance office at a salary of $65 a week, which is more than his earnings in any prior year. At the trial of the case he appeared to be in normal health and physical ability and of more than average intelligence. He is apparently able without difficulty to read, walk and pursue ordinary activities not

involving unusual effort or strain. As a result of his very remarkably successful surgical treatment his present physical disability consists of 15% to 20% limitation of the motion of the neck; 10% to 15% limitation in the use of the left hip; 20% to 25% limitation in the right kneecap. His broken arm healed normally and he has no present disability to the lumbar region of the spine. He still has some double vision amounting to possibly 25% impairment of the use of the eyes owing to double vision at certain angles which, it is said, could be largely corrected by a not-too-dangerous and not-very-expensive operation in shortening one of the muscles controlling the rotation of the eyes. He is able to read without difficulty and perform clerical duties. He lost 16 months of gainful activity and suffered long and severe pain and discomfort from his injuries. His life expectancy at 25 was 43 years. Considering all these factors I reach the conclusion that if the defendant were liable the amount of a reasonably compensatory verdict would be $35,000.00.

For the reasons stated it is Ordered this 5th day of November, 1954, by the United States District Court for the District of Maryland that the complaint in this case be and the same is hereby dismissed.

/s/ W. CALVIN CHESNUT,
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, United States of America, through its attorneys, and for answer to plaintiff's Amended Complaint alleges as follows:

I.

In answer to paragraphs I, II, IV, V and VI of this Amended Complaint, defendant hereby incorporates by reference, as if set forth herein in full, the answer made to these numbered paragraphs in the original complaint.

II.

In further answer to paragraph III of plaintiff's Amended Complaint, defendant admits all the allegations therein contained except that defendant specifically denies that Mayer was acting in line of duty or within the scope of his employment, and further denies that it was necessary for Mayer to be traveling on January 23, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours on the 28th of January, 1954. Defendant does, however, admit the applicability of the Joint Travel Regulations to the trip in question.

Wherefore, having fully answered, defendant prays that plaintiff be denied any and all relief

against said defendant and that this cause of action be dismissed with prejudice.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Asst. United States Attorney.

Receipt of copy attached.

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter coming on regularly before the undersigned Judge of the above-entitled Court and a trial having been had on the 28th day of December, 1954, the plaintiff appearing in person and through his attorneys, George J. Toulouse, Jr., and George R. Mosler, and the defendant appearing by its attorney, Chas. P. Moriarty, United States District Attorney, and being represented at said trial by F. N. Cushman, Assistant United States District Attorney, and witnesses having been sworn and testified and the Court having heard the evidence and now being fully advised in the premises, makes and enters the following

Findings of Fact

I.

That the plaintiff, Harold Kennedy, was at the time of the commencement of the above-entitled

action a resident of the Judicial District of the United States, for the Western District of Washington, Northern Division.

II.

That the plaintiff invokes the jurisdiction of this Court under Title 28, U.S.C.A., Section 1346 (b), and Title 28, U.S.C.A., Sections 2671, et seq.

III.

That on the 23rd day of January, 1954, Staff Sergeant Richard E. Mayer was a member of the Military Forces of the United States, an employee of the United States of America, and at all times referred to on said day was acting in line of duty and within the scope of his employment. That at the time of the accident herein referred to, said Richard E. Mayer was in fact proceeding as directed and pursuant to that certain order Number 2, dated 5 January, 1954, and reading as follows:

"Sfc Richard E Mayer RA 19 319 029 Hq & Hq Co 16th Sig Bn Corps rel asg trf WP Army Language Sch Presidio of Monterey Calif at the time rept to Comdt thereat NLP 2400 hrs 28 Jan 54 for purpose of attending forty-six wks Chinese-Mandarin Language Crse. Ten (10) ADALVAHP 2/pt of delay Seattle Wash prior to rept to sch. EM rept AG-C Post Hq for ConUS records check prior to departure fr this station. TC may determine common carr and furn nec trans and meal tickets and/or FC will pay alws auth by JTR. Subj EM chargeable against the Army Language Sch

quota allotted to Asst Ch of Staff GI. Auth: 6th Ind Hq 6A AMAGP-2 201 12 Nov 53. PCS TPA TDN 2142010 401-6-206-18 P 1410-02 03 07 S 99-999. EDCSA: 14 Jan 54.

By Command of Brigadier General Colgern:

TITO G MOSCATELLI
Colonel, GS Chief of Staff

Official:

JESSE W. SCOTT
CWO USA Asst Adj Gen"

That the abbreviation "TPA" in the above-described order means "Travel by personal automobile or vehicle is authorized." That the abbreviation "TDN" means "The travel directed (in the order) is necessary to comply with the order."

That under the terms of said order said Richard E. Mayer was directed to proceed to the Presidio of Monterey, California, and was, under the terms of said order, authorized to travel by his privately owned automobile, and, under the terms of said order, was entitled to be paid mileage at the rate of six (6c) cents per mile for the official distance of 1,001 miles to the Presidio of Monterey, California; that the said Richard E. Mayer was in fact so paid by the defendant herein for the mileage in question—all as provided for in said Special Order Number 2 and under the Joint Travel Regulations issued by the Department of Defense of the United States of America; that at the time of the occurrence of the accident hereinafter described said

Richard E. Mayer was in fact proceeding to the Presidio of Monterey, California, by his own privately owned automobile and that it was necessary that he eventually make and he was making that trip within the scope of his authority from the defendant on said 23rd day of January, 1954, in order to traverse the distance to the Presidio of Monterey, California, as contemplated by the Joint Travel Regulations of said Department of Defense, and in order to report to the Presidio of Monterey, California, not later than 2400 hours (at 12:00 o'clock at night) on the 28th day of January, 1954.

The Court further finds that on January 23, 1954, the defendant, United States of America, acting through its appropriate officers, could at all times control Staff Sergeant Richard E. Mayer in his actions in the same manner that a private employer might have control over him, had Staff Sergeant Richard E. Mayer been in the employ of such private employer. That the travel herein involved was in the interest of the employer, the United States of America, and necessitated by the interest of the employer and not by the interest of Staff Sergeant Richard E. Mayer; that the work which the employer, the United States of America, desired Staff Sergeant Richard E. Mayer to perform, namely: to study the Chinese-Mandarin language—not for his benefit but for the benefit of the United States of America—created the necessity for the travel herein involved, and that under the law of the State of Washington where this accident happened a private

employer would be liable for similar acts committed by his employee.

IV.

That U. S. Highway 99 is a state highway, running in a general northerly and southerly direction between the cities of Seattle and Tacoma, in the State of Washington.

V.

That on the 23rd day of January, 1954, plaintiff was proceeding in a northerly direction on U. S. Highway 99 and was in his own or easterly line of traffic. That at said time plaintiff was operating his own 1951 Packard automobile and was proceeding in a careful and prudent manner; that at a point on said highway, approximately 10½ miles south of Seattle, Washington, Richard E. Mayer was operating his automobile on said highway in a southerly direction, being en route, pursuant to said Special Order Number 2 hereinbefore set forth, to the Presidio of Monterey, California, when he carelessly and negligently, and without due care, crossed said highway and struck the automobile of the plaintiff, causing severe damage to the automobile of the plaintiff and severe injuries to the person of the plaintiff. That at said time and place said Richard E. Mayer was negligent, which negligence was the proximate cause of plaintiff's damage, hereinafter described, in the following particulars:

1. In violating the statutes of the State of Washington governing the operation of automobiles upon the highways of the State of Washington;

2. In failing to maintain a lookout for the plaintiff's automobile on plaintiff's side of said highway;

3. In driving his automobile at said time and place on the wrong side of the roadway when he knew, or had reason to know, that plaintiff's automobile was occupying said portion of said roadway;

4. In operating his automobile at an excessive rate of speed in view of the weather conditions then and there obtaining on said highway.

That the defendant United States of America has admitted in open court its liability under this paragraph.

VI.

That as a direct and proximate result of the aforesaid-described negligence on the part of said Richard E. Mayer, said plaintiff has suffered the following damages:

(1) An extensive laceration of the forehead with avulsion of the scalp, and moderately severe concussion of the brain, shock, a broken rib, a laceration of the right knee and leg; traumatic phlebitis of the right leg; large residual scar of the forehead and leg which are permanent.

(2) Damage to his automobile in the sum of $1,318.81, said figure being arrived at through its being the reasonable depreciated value of said automobile before and after the collision herein described.

(3) Special damages for medical and hospital expense and general damages for pain and suffer-

ing and residual injuries in the sum of Three Thousand Two Hundred Fifty and no/100 ($3,250.00) Dollars.

VII.

That plaintiff's attorneys should be awarded twenty (20%) per cent of the amount of any judgment awarded by the Court herein, as compensation for their services to plaintiff in this action.

From the foregoing Findings of Fact, the Court now makes and enters the following

Conclusions of Law

I.

That the plaintiff is entitled to judgment against the defendant, United States of America, in the sum of Four Thousand Five Hundred Sixty-eight and 81/100 ($4,568.81) Dollars, together with interest thereon at the rate of four (4%) per cent per annum from the date of the entry of said judgment until paid.

II.

That plaintiff's attorneys, George J. Toulouse, Jr., and George R. Mosler, should be awarded twenty (20%) per cent of the amount of said judgment as and for attorneys' fees for services performed in this case.

Done in Open Court this 30th day of December, 1954.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented and approved by:

/s/ GEORGE J. TOULOUSE, JR.,
Of Attorneys for Plaintiff.

Approved:

CHAS. P. MORIARTY,
U. S. District Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 30, 1954.

In the United States District Court for the Western District of Washington, Northern Division

No. 3689

HAROLD KENNEDY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled matter coming on regularly before the undersigned Judge of the above-entitled Court and a trial having been had on the 28th day of December, 1954, the plaintiff appearing in person and through his attorneys, George J. Toulouse, Jr., and George R. Mosler, and the defendant appearing by its attorney, Chas. P. Moriarty, United States District Attorney, and being represented at said

trial by F. N. Cushman, Assistant United States District Attorney, and witnesses having been sworn and testified and the Court having heard the evidence and being fully advised in the premises, and having heretofore, in writing, rendered, made and entered its Findings of Fact and Conclusions of Law herein, now, therefore,

It Is Ordered, Adjudged and Decreed that the plaintiff have and recover judgment against the defendant, United States of America, in the sum of Four Thousand Five Hundred Sixty-eight and 81/100 ($4,568.81) Dollars, together with interest thereon at the rate of four (4%) per annum from the date of entry of this judgment until paid, and together with his taxable costs herein in the further sum of $19.00.

It Is Further Ordered, Adjudged and Decreed that the plaintiff's attorneys, George J. Toulouse, Jr., and George R. Mosler, be awarded twenty (20%) per cent of the amount of the judgment herein awarded to plaintiff, as and for their services as attorneys for the plaintiff in this cause.

Done in Open Court this 30th day of December, 1954.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented and approved by:

/s/ GEORGE J. TOULOUSE, JR.,
Of Attorneys for Plaintiff.

Approved:

CHAS. P. MORIARTY,
U. S. District Attorney;

By /s/ F. N. CUSHMAN,
Assistant U. S. District
Attorney.

[Endorsed]: Filed and entered December 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Harold Kennedy, plaintiff, and to George J. Toulouse, Jr., his attorney:

Notice is hereby given that defendant herein, the United States of America, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that Judgment entered in the above-entitled cause on the 28th day of December, 1954.

Dated this 24th day of February, 1955.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed February 24, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING RECORD ON APPEAL

On motion of defendant, United States of America, and Affidavit of F. N. Cushman, attached thereto, being considered by the Court, now therefore, it is hereby

Ordered that the time for docketing the record on appeal in this cause be, and it is hereby extended to and including May 1, 1955.

Done in Open Court this 24th day of March, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney.

The Plaintiff hereby consents to the entry of the foregoing order.

/s/ GEORGE J. TOULOUSE, JR.,
Attorney for Plaintiff.

Receipt of copy attached.

[Endorsed]: Filed March 24, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING RECORD ON APPEAL

On motion of defendant for an additional twenty-one days in which to docket record on appeal in the above-entitled case, the matter being considered by the Court, now therefore, it is hereby

Ordered that the time for docketing the record on appeal in this cause be, and it is hereby further extended, from May 1, 1955, to and including May 22, 1955, which date is less than ninety days from February 24, 1955, the date of filing Notice of Appeal herein.

Done in open Court this 27th day of April, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ F. N. CUSHMAN,
Attorney for Defendant.

The Plaintiff hereby consents to the entry of the foregoing order.

/s/ GEORGE J. TOULOUSE, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed April 27, 1955.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3689

HAROLD KENNEDY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable John C. Bowen, District Judge.

December 28, 1954

This matter came on for trial before the Honorable John C. Bowen, Judge of the above-entitled Court, on Tuesday, December 28, 1954, at 10:00 o'clock a.m., plaintiff appearing by George R. Mosler, Esq., 2207 Northern Life Tower, Seattle, Washington, and George J. Toulouse, Jr., Esq., 805 Arctic Building, Seattle, Washington, and the defendant appearing by Francis N. Cushman, Assistant United States Attorney, U. S. Courthouse, Seattle, Washington. During the course of said trial the following testimony was given by Joseph John Cichy and the following oral decision was made by the Court.

JOSEPH JOHN CICHY

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Toulouse:

Q. Will you state your name?
A. Joseph John Cichy.
Q. Will you spell your last name?
A. C-i-c-h-y.
Q. And your rank?
A. Chief Warrant Officer. [2*]
Q. And that is in the United States Army?
A. Yes, sir.
Q. Is that the Regular Army?
A. Regular Army.
Q. And what is your particular specialty?
A. I am a personnel officer.
Q. Now, in Army orders, what do the abbreviations TDN mean?
A. Travel directed is necessary.

Mr. Cushman: Your Honor, just for the purposes of the record, I wonder if perhaps we could qualify him as an expert to interpret the order. I wonder if you have asked enough questions.

Mr. Toulouse: Well, I think he has qualified himself. He said he was a warrant officer. I will ask him a few more questions.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joseph John Cichy.)

Q. (By Mr. Toulouse): You are a warrant officer or an adjuant in the United States Army?

A. That is correct.

Q. Are you familiar with the rules and regulations of the United States Army governing the issuance of orders to subordinate members of the Armed Forces in the United States Army?

A. Yes, sir, to the best—— [3]

Q. And I will ask you whether or not you have examined the Special Order Number 2, Headquarters at Fort Lewis, dated 5 January, 1954, issued to Staff Sergeant Richard E. Mayer on the 4th day of January, 1954, which is part of the pleading in this case?

A. Yes, sir, I examined the extract, not the order.

Q. You examined the extract of the order applying to Sergeant Mayer? A. Yes, sir.

Q. Now, I will ask you, in that order appears the abbreviation WP. Will you state what that means? A. WP means "Will proceed."

Q. Now, I will ask you what does the abbreviation PCS in that order mean?

A. Permanent Change of Station, sir.

The Court: You may ask him the next question.

Q. What does the abbreviation TPA mean?

A. Travel by private, either automobile or vehicle, is authorized.

Q. Now, I will ask you, what does the abbreviation TDN in that order mean?

A. Travel directed is necessary.

(Testimony of Joseph John Cichy.)

The Court: If necessary?

The Witness: Travel directed is necessary. [4]

Q. (By Mr. Toulouse): Is necessary in the interests of the United States?

A. Yes, that is what it implies. We just normally state travel directed is necessary for the accomplishment of——

The Court: I do not know the word between "directed" and "necessary."

The Witness: Is.

The Court: Is there an "if" in there?

The Witness: No, sir.

The Court: Travel directed——

The Witness: Is necessary.

Q. (By Mr. Toulouse): Sergeant, I will ask you whether or not there is an abbreviation TDN in the manual of the Adjutant General, is there not?

A. Yes, there is.

Q. And opposite that an abbreviation all warrant officers in the Armed Forces of the United States are authorized to use, the abbreviation TDN, as meaning the travel—referring to the travel involved in the order—directed in the order—T meaning travel—D meaning directed—is necessary in the interests of the United States. Isn't that what it means? Doesn't it mean [5] the travel directed is necessary in the interests of the United States?

A. Well, I wouldn't say in those words, no.

Q. Well, will you put it in your words?

A. Travel directed is necessary to comply with the order, because—well——

(Testimony of Joseph John Cichy.)

Q. Now, I will ask you whether or not you are familiar with the official travel regulations for the determination of travel time between two points for enlisted men? Are you familiar with those regulations?

A. Let us say I am familiar with them.

Q. Do you know whether or not for purposes contemplated by the Joint Travel Regulations that a person on a travel status is assumed to travel 250 miles per day?

A. Yes, sir, that is correct. That is authorized.

The Court: 250 miles per day is an authorized day's travel?

The Witness: Yes, sir, by the Joint Travel Regulations.

Q. (By Mr. Toulouse): Now, you are likewise familiar, are you not, Sergeant—I mean Warrant Officer Cichy—with the Articles of War which I understand are now denominated the Articles, which require that all enlisted personnel obey a competent order, are you not? [6] A. Yes, sir.

Q. And state whether or not Sergeant Mayer in this case would be subject to court-martial if he failed to report to the Presidio at Monterey, California, at midnight on the 28th day of January, 1954?

A. He would not be subject to court-martial until such time as it was proven that his failure to arrive was due to his own negligence.

Q. I will state it another way. If he wilfully disobeyed the order and did in fact report one

(Testimony of Joseph John Cichy.)

minute after midnight on the 29th day of January, 1954, he would be subject to court-martial, is that not correct? A. Yes, sir, that is right.

Q. And that under the terms of this order he was required to report at not later than midnight on the 28th day of January, 1954, is that correct?

A. Yes, sir, that is correct.

Q. Now, will you state as to whether or not you are familiar with the power of a commanding officer of the United States to control a non-commissioned officer of the United States at any point or at any place where that sergeant may be?

A. You are speaking of disciplinary control?

Q. Yes. I will ask you the specific question. Could Brigadier General Colbern or Tito G. Moscatelli, his [7] Chief of Staff, have changed Staff Sergeant Mayer's orders on January 23, 1954, had they seen fit to so change those orders?

A. Yes, sir. The publishing authority has the authority to change.

Q. The issuing authority has a right to control, do they not, the movement of any sergeant in the United States Army at any time?

The Court: If the sergeant is allotted to the command?

Mr. Toulouse: That is what I said—The issuing officer.

A. Yes, right. Your question was a little bit——

Q. Then, in this case, if Brigadier General Colbern, the Chief of Staff, or any of his subordinate officers, had decided to direct Sergeant Mayer to

(Testimony of Joseph John Cichy.)

remain at Fort Lawton they would have had a right and power to do so, is that correct?

A. Yes, sir, they would have.

Q. They would likewise have a right and power to cancel his leave at any time, is that correct?

A. Yes, sir.

Q. They would likewise have a power to direct him to go to any place in any different station in the United States other than the Presidio at Monterey had they [8] chosen to, is that not correct?

A. Yes.

Q. They would likewise have a right to tell him to proceed by air or by bicycle, had they chosen, is that not correct? A. Yes, sir, that is correct.

Q. You are likewise familiar, are you not, Warrant Officer, that under the regulations of the United States Army that an enlisted staff sergeant while en route pursuant to travel orders is in fact in the line of duty within the contemplation of the regulations of the United States Army?

A. Yes, sir, in line of duty, speaking of line of duty.

Q. That is correct, is it not?

A. (Witness nods head affirmatively.)

The Court: At this point we will take a ten-minute recess.

(Recess.)

Mr. Cushman: The doctor is here, your Honor.

The Court: I wish him to be accommodated first.

(Testimony of Joseph John Cichy.)

The witness will temporarily be withdrawn and you may call the doctor.

(Whereupon Mr. Cichy was temporarily withdrawn from the witness stand. At the conclusion of [9] Dr. Vukov's testimony, the following occurred:)

The Court: I ask the witness on the stand who was interrupted to resume the stand.

(Mr. Cichy resumed the stand for further interrogation.)

Mr. Toulouse: I think that is all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Cushman:

Q. Mr. Cichy, I will now read this language to you. I am reading from the order. (Reading.) "The Transportation Corps may determine common carrier and furnish necessary transportation and meal tickets and/or Finance Corps will pay allowance authorized by Joint Travel Regulations." Now, as an everyday operating feature, what is meant by those provisions?

Mr. Toulouse: I object to this witness or any witness attempting to explain that particular statement. It is free of any ambiguity. It doesn't in any way involve a symbol. It is plain, common, everyday ordinary language. There is no pleading affirmatively of any custom or practice.

(Testimony of Joseph John Cichy.)

The Court: I would say the objection, so far as it has gone, seems to be subject to favorable [10] consideration by the Court unless counsel offering the testimony wishes first to show that there is some ambiguity or some special meaning in the Armed Forces or that it does not have its ordinary meaning in the Armed Forces or in connection with this subject here, something to indicate some need for explanation.

Q. (By Mr. Cushman): Mr. Cichy, are you in a position where you are normally involved in the preparation of travel orders?

A. Yes, sir, I am.

Q. And in the preparation of travel orders, are there circumstances which make one order substantially different from the next? A. Yes, sir.

Q. I ask you in this case what kind of a transfer does this order involve?

A. A permanent change of station.

Q. And that is opposed to what?

A. Temporary duty travel which would be going from his home station to another station and back to his home station.

Q. In other words, he was going to be permanently assigned to a new station?

A. Yes, sir.

Q. And he had been assigned where? [11]

A. Fort Lewis, Washington.

Q. And now he was going to be assigned where?

A. Well, at the language school at Monterey, California.

(Testimony of Joseph John Cichy.)

Q. At what date was he to be transferred as far as his Army paper work is concerned?

A. The EDCSA indicated in the order, I believe, was the 13th of January, was it not? The 13th or the 14th.

Q. Yes, the 14th of January, and what does that term mean?

A. That term means that the station from which he is being transferred will drop him from their strength account and the station that is gaining him will pick him up on their strength account, in other words, on their morning report as we call it.

Q. From which station will orders be given to this individual during the times in question here, assuming as we have, a delay en route, and then an allowance for travel, assuming those, and assuming this change of strength accountability that you just mentioned, from which station would his future orders emanate after the day of this change of strength accountability?

Mr. Toulouse: I object to that, your Honor, because that, of course, is controlled as a matter [12] of law by the Articles and the Articles of War and by the Army regulations. Either station can direct.

The Court: I have not seen the Articles in evidence yet.

Mr. Toulouse: Well, your Honor, the Articles are a part of the statutory law appearing in 50 Appendix War, Title U.S.C.A.

Q. (By Mr. Cushman): Are there official regulations on this subject, Mr. Cichy?

(Testimony of Joseph John Cichy.)

The Court: The objection is sustained. You may ask him another question.

A. Yes.

Mr. Cushman: Well, your Honor, I was merely going to ask the witness if there were regulations.

The Court: That objection as stated is sustained so that the record will be clear. You may proceed with proper interrogation, including the last question, which had not yet been answered. The answer should be yes or no. In addition to the statute, is what you mean, is it not?

Mr. Cushman: Yes, your Honor.

The Witness: Well, may I ask——

The Court: You just answer that question yes or no, if you know. [13]

The Witness: Well, the way the question was put I can't say yes, there are.

The Court: Well, can you say no, there are not?

The Witness: I can't say no, there are not, either.

The Court: Well, then, is it true that you do not know the answer to the question as put?

The Witness: Well, the question as put——

The Court: All right. Ask him another question.

Q. (By Mr. Cushman): We have in this order EDCSA 14th of January, 1954. Are there any Army regulations that you know of, and are you familiar with those regulations, which would inform you as to which station, whether the former station or the new station, would be the station to have

(Testimony of Joseph John Cichy.)

whatever control over this man the Army would have during the period after leaving Fort Lewis until the time he reports at the Presidio in Monterey? A. Yes, sir.

Q. And what station do those regulations provide would control?

Mr. Toulouse: I object to that. The regulations would be the best evidence if it is an [14] independent regulation.

The Court: Is the plaintiff going to introduce the regulations?

Mr. Cushman: I don't have the regulations, your Honor. Your Honor, the regulations are so very voluminous. Well, in this particular instance, the regulations are so very voluminous and they only have one official copy of them that was available, so we aren't able to put them in evidence.

The Court: You should be able to. The objection is sustained. You should be able to have a copy of it or have it here and read from it, or you should do something. The witness should not be permitted to state from his own mind, I do not think. If you have a copy of something that you think the witness would recognize, after showing it to opposing counsel, you might feel advised to ask a question based upon some copy or something, but as to whether or not you wish to proceed further, you may proceed.

Mr. Cushman: Yes, your Honor.

Q. (By Mr. Cushman): You had stated that this was a permanent change of station?

(Testimony of Joseph John Cichy.)

A. Yes, sir.

Q. You are continually preparing orders for the transfer [15] of individuals from your post to other posts?

The Court: Well, why do you not ask him a question? I think now that counsel should apply the ordinary usual standard of cross-examination. Ask him. Do not make statements in the record that are neither a question nor an answer. I wish you to proceed. We are spending a lot of time fooling around here right now.

Q. (By Mr. Cushman): What control does the Army have over a man when he is traveling?

A. Well, they have disciplinary control over him from the time he departs the station until the time he arrives at his new station.

Q. What is disciplinary control?

A. He is subject to all the laws of the land, the same as any civilian walking down the street.

Q. And are there any particular military aspects of this?

A. Only the fact that he was picked up by civilian police. If the offense was such as to warrant being turned over to military authorities, they would turn him over to the closest military authorities.

Q. And when Army personnel are transferred from one post to the next—— [16]

Mr. Toulouse: I object to that, your Honor, as irrelevant and immaterial.

The Court: The objection is overruled.

(Testimony of Joseph John Cichy.)

Q. (By Mr. Cushman): When Army personnel are transferring from one post to the next and, as in this case, when they are to report on a specific day, can the Army exercise any control over the individual that would be any different, prior to the date of reporting, can they exercise any control over the individual that they could not exercise over a man who was merely on leave?

Mr. Toulouse: Just a second. I object to the question on the grounds that it poses a hypothetical that is irrelevant and immaterial to any issue framed by these pleadings, and furthermore that it calls for this warrant officer to interpret the Articles of the United States that are the statutes of the United States with respect to enlisted men obeying all lawful orders of superior officers or to interpret a regulation of the Army.

The Court: I am so convinced of this witness' intelligence and discriminatory reasoning powers and frankness to believe that it is safe for him to receive such a question, and the objection is overruled. I caution the witness not to answer it [17] unless you feel you know the answer and are certain of it.

Read the question.

(The last question is read by the reporter.)

A. The control is exactly the same regardless of circumstance.

Q. (By Mr. Cushman): Now, you had testified in answer to question by plaintiff about the mileage

(Testimony of Joseph John Cichy.)

allowance for a person who was transferred, and I believe you stated that it was 250 miles a day?

A. Yes, sir.

Mr. Cushman: I think we have agreed, counsel, that the distance in this case was 1,001 miles?

Mr. Toulouse: Yes.

Q. (By Mr. Cushman): How many days' travel time would that provide?

A. 250 divided into your 1,000 would be roughly four days.

Q. And what about the one mile?

A. The one mile wouldn't make any difference because the Finance Officer has the final say-so and it would be computed as part of the fourth day.

Q. Now, when are Army personnel permitted to travel in their own private automobiles while [18] en route pursuant to orders or on duty?

Mr. Toulouse: That is irrelevant and immaterial to any issue.

The Court: Read the question.

(The last question is read by the reporter.)

The Court: They might be permitted in every other kind of a situation as to every other traveler traveling under circumstances like this one, but this one might not have been. Why is it material, Mr. Cushman?

Mr. Cushman: Well, your Honor, the only issue in this case is the scope of employment, and unless we are able to show what you would call in the

(Testimony of Joseph John Cichy.)

normal case the practices and usages of the trade, we are limited in trying to show the control.

The Court: Have you any plea in your answer of an issue which raises the question that under the practices of the military profession things are done which are not ordinarily done, that is to say something that is material to this action?

Mr. Cushman: Well, your Honor, we have denied that he is within the scope of his employment.

The Court: You should have plead the custom, The custom must be pleaded. The objection is sustained. Proceed with something else. The Court will [19] restrict cross-examination soon if there is not some indication that it can be moved on more expeditiously.

Mr. Cushman: I believe that is all.

Mr. Toulouse: That is all.

The Court: Step down.

(Witness excused.) [20]

ORAL DECISION

The Court: From a preponderance of the evidence in this case, the Court finds, concludes and decides that so far as liability is concerned, Sergeant Mayer at the time of the accident alleged in plaintiff's complaint was acting in the course of his employment as a person engaged in the military business of the Armed Forces of the United States, and the acts done by him in deriving said car at said time were within the scope of his authority;

That at the time and place of the accident complained of in this plaintiff's complaint, Staff Sergeant Mayer was in fact just as much in pursuit of his employer's business on the trip in his car to his militarily assigned post to advance his education of value to the military forces as if instead of being where he was at the time and place of this accident and instead of using his car for the business he then was using it, he had then been assigned to duty on the Seattle waterfront to advance his education in the Chinese language to be used in his military work, and if in the course of that educational activity, during the hours of his daily duty, he had, with permission and under circumstances like [21] those here, been using his automobile and had been required to go from one dock to another and after interviewing one Chinese language teacher on board one vessel at one dock he had used such automobile to go to the other dock to interview some other Chinese language teacher on board a ship at the other dock, and if in using this automobile in that transaction an accident had happened under conditions like those in this case proximately resulting in injuries and damages to plaintiff like those here;

That since with the permission of the Government Sergeant Mayer was here using his car to transport himself while on such Government business at the time and place of the accident, he necessarily must be regarded in law as being the operator of the transportation vehicle whether it was his own automobile or a Government automobile. Such auto-

mobile was just as much on Government business at the time and place of the accident as was the Government employee, Staff Sergeant Mayer;

That under the law of the State of Washington, in which state the accident happened, a private employer of one of its employees would be liable for the negligent injury of another by such employee under [22] circumstances like those here involved and which proximately caused the injuries and damages in this action complained of by plaintiff at least to the extent hereinafter specifically found and approved by the Court;

That at the time of commencing this action the plaintiff was a resident, as in his original complaint alleged, of King County, Washington; that this Court does have jurisdiction of this cause; and that all of the material matters and things alleged in paragraphs II, III, IV, V and VI are established by a preponderance of the evidence in this case, except as to the loss of earnings stated in paragraph VI, subparagraph (3), and except the total sum of damages stated in line 9 on page 4 of the amended complaint; that as to these paragraphs specifically mentioned just now, namely, II, III, IV, V and VI, the Court refers to those appearing in plaintiff's amended complaint filed herein December 27, 1954;

That plaintiff has been injured and damaged as a proximate cause of the matters and things aforesaid resulting proximately from the negligence of the defendant's Armed Forces employee, Staff Sergeant Richard E. Mayer, as alleged in plaintiff's complaint [23] in the total sum of $3,250.00 on

account of all the matters and things in plaintiff's complaint alleged, including all special and general damages and all other causes of action and items of claim of every name and nature stated in such complaint or complaints.

Is there any other issue tendered by the pleadings not covered by the Court's announced decision?

Mr. Toulouse: Only one thing. I am not sure, your Honor, but does that cover the damage to the car, the $2,350.00, that is the $1,381.00?

The Court: No, it does not.

Except that in addition to the foregoing, the Court does award to plaintiff the further sum of $1,818.81 as special damages to plaintiff's car, which sum is in addition to the said sum of $3,250.00.

Mr. Toulouse: Your Honor, there is only one other point. Under the Federal Tort Claims Act, the allowance of attorneys' fees is limited to twenty per cent.

The Court: I would like to ask, Mr. Toulouse, do you still claim 20% of the recovery under the statute?

Mr. Toulouse: We request 20% of the [24] award.

The Court: I ask, Mr. Kennedy, do you have any objection to the Court allowing out of this recovery awarded to the plaintiff 20% for your attorneys' fees as the law permits the Court in its discretion to do if the Court is convinced that the services are of that value? Do you wish to advise the Court on this occasion as to whether you ap-

prove of the Court's awarding to Mr. Toulouse and deducting from the foregoing amounts allowed to you 20% of all such amounts you are to receive as and for his attorneys' fees? If you have not finally discussed the matter with Mr. Toulouse, you are at liberty to do so now before you decide.

Have you considered the matter?

Mr. Kennedy: Yes, I have.

The Court: What is your attitude?

Mr. Kennedy: In agreement.

The Court: Do you approve of his receiving 20% of the recovery?

Mr. Kennedy: Yes, sir.

The Court: That will make your take-home recovery, so to speak, 20% less than it would be if you did not have to pay your attorney. Do you understand that?

Mr. Kennedy: Yes, sir. [25]

The Court: And you approve the Court allowing 20%, do you, to your attorney?

Mr. Kennedy: Yes, sir.

The Court: Then the Court does find that such sum of 20% is a reasonable sum to be allowed plaintiff's attorneys as and for plaintiff's attorneys' fees in this case and that said sum may be paid to the plaintiff's attorneys out of the said over-all award just announced by the Court.

Mr. Toulouse: When would you like findings of fact and conclusions of law to be submitted, your Honor?

(Whereupon discussion was had relative to

the setting of a date for the above-mentioned purpose.)

The Court: The matter is continued until 2:00 o'clock p.m. on Thursday afternoon, December 30th, for the purpose mentioned. [26]

Certificate

I, Frances I. Gilligan, do hereby certify that I am official court reporter for the above-entitled court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed April 18, 1955. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure I am transmitting herewith as the record on appeal

in said cause, all of the original documents in the file dealing with the above cause, same being the record on appeal from the judgment filed and entered Dec. 30, 1954, in behalf of plaintiff, said papers being identified as follows:

1. Complaint, filed Apr. 16, 1954.
2. Marshal's Return on Summons, filed Apr. 22, 1954.
3. Appearance of Defendant, filed May 6, 1954.
4. Answer, filed June 23, 1954.
5. Memorandum in Support of Motion to Dismiss, filed Dec. 27, 1954.
6. Amended Complaint, filed Dec. 27, 1954.
7. Praecipe for Subpoena, Dr. S. J. Vukov, filed Dec. 27, 1954.
8. Answer to Amended Complaint, filed Dec. 28, 1954.
9. Plaintiff's Memorandum Brief, filed Dec. 28, 1954.
10. Marshal's Return on Subpoena, Vukov, filed Dec. 29, 1954.
11. Findings of Fact and Conclusions of Law, filed Dec. 30, 1954.
12. Judgment, filed Dec. 30, 1954.
13. Notice of Appeal, filed Feb. 24, 1955.
14. Motion Deft. to Extend Time for Docketing Appeal, filed March 24, 1955.
15. Order Extending Time for Docketing Record on Appeal to May 1, 1955, inclusive, filed March 24, 1955.
16. Court Reporter's Transcript of Testimony

of Joseph John Cichy, and Oral Decision by the Court, filed April 18, 1955.

17. Order Extending Time for Docketing Record on Appeal to 5/22/55, filed April 27, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00; and that said amount has not been paid to me because the appeal herein is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 16th day of May, 1955.

[Seal] MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14767. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Harold Kennedy, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 17, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14767

UNITED STATES OF AMERICA,
Appellant,

vs.

HAROLD KENNEDY,
Appellee.

STATEMENT OF APPELLANT'S POINTS ON APPEAL

On appeal herein to the United States Court of Appeals for the Ninth Circuit, appellant United States of America, relies on the following points:

1. The District Court erred in holding that Staff Sergeant Richard E. Mayer was acting in the line of duty and within the scope of his employment at the time of the accident in question.

2. The District Court erred in ruling that the United States of America could at all times control Staff Sergeant Mayer in his actions in the same manner that a private employer might have control over him had he been in the employ of such an employer.

3. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as he had not been directed by the United States to travel by his own automobile.

4. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as the use of his own automobile was for his personal convenience and not for that of the Government.

5. The District Court erred in concluding that the law of the State of Washington was relevant on the question of whether Staff Sergeant Mayer was acting within the scope of his employment.

6. The District Court erred in concluding that plaintiff was entitled to judgment against the United States.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney;

PAUL A. SWEENEY,
Chief, Appellate Section, Civil Division, Department of Justice.

[Endorsed]: Filed May 20, 1955.